



Report to the Uniformity Committee

Status of P.L. 86-272 Statement of Information Project

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Background

On November 7, 2018, the Uniformity Committee initiated a project to update the MTC's Statement of Information regarding P.L. 86-272. This decision recognized the significant changes to both the economy and the way that business is conducted since the Statement was last revised in 2001.¹ The fact that P.L. 86-272 was enacted in 1959, long before the development of numerous technological advances that have become integral parts of modern business practices, means that the application of the statute is often unclear. Reexamination of the statute by the Commission, therefore, can both address these ambiguities and promote uniform application of the law.

The Work Group consists of 18 volunteers from 14 states. It is chaired by Laurie McElhatton, Legal Counsel at the California Franchise Board. Eleven meetings of the Work Group have been held to date (via teleconference). Each of the meetings has been open to the public, and individuals from the private sector and additional state employees have participated.

The most recent version of the Statement of Information is attached to this Report. The addendum to the Statement contains a copy of P.L. 86-272, which is codified at 15 U.S.C. §§381-384. Other information, including summaries of Work Group meetings and reference materials, is available on the Work Group's project page which is posted on the MTC website at www.mtc.gov.

Limited Scope of the Project

The Work Group is cognizant that its role is a limited one: to consider the application of P.L. 86-272 to modern business activities. This project is fundamentally a matter of statutory

¹ The official name of the Statement is "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272."

interpretation. The recommendations that will eventually be submitted to the Uniformity Committee will not address when persons *should* be subject to income tax obligations. There are, of course, other limitations on taxation. So, for example, the U.S. Constitution may shield remote sellers from a state's income tax if they sell relatively small amounts of goods or services into that state. *Cf. South Dakota v. Wayfair, Inc.* (finding that the South Dakota statute imposing tax collection responsibilities on sellers did not violate the Commerce Clause in part because the statute exempted small sellers from the law). Alternatively, a state may have in place a statutory provision containing thresholds to shield small businesses from tax. *See* MTC Factor Presence Nexus Standard for Business Activity Taxes, approved October 17, 2002.²

States that have not adopted such thresholds may wish to consider doing so if either the Commission or individual states conclude that P.L. 86-272 does not provide immunity to small remote sellers that utilize modern business tools.

Discussion

Since the Uniformity Committee's last meeting in April, the Work Group has continued to assess how the provisions of P.L. 86-272 apply to various business activities conducted via the Internet. (The revised list of Scenarios being considered by the Work Group is attached to this Report.) These discussions have served to identify key issues and to develop a framework for analyzing the application of the statute to various contemporary fact patterns.

The Work Group has applied the following two-step analysis to determine if P.L. 86-272 provides a business immunity from income taxation. The first step is to determine whether a business activity constitutes the solicitation of orders for tangible personal property, since such activity is protected by the statute.³ This question is often addressed by the current version of the MTC Statement of Information. If the activity extends beyond solicitation of orders for tangible personal property, then the second step is to determine where the activity takes place. A business will not lose its immunity if it engages in non-solicitation activities entirely outside of the taxing state.

As to this second step, a consensus has developed among Work Group members--if an in-state customer interacts with a remote business's website (*i.e.*, does more than just view a presentation on the website), the business has engaged in activities in that state. This thinking is based in key part on the following considerations:

(1) When a customer engages a seller's website, the website transmits software or code to the user's computer, which is stored in the user's computer for some period of time. The code serves to facilitate the interaction between the customer and seller.

²It should be noted that in many cases immunity from income tax in one state does not reduce a business's overall tax liability since its income may as a result be subject to tax in its state of residence.

³The U.S. Supreme Court has held that activities that are ancillary to solicitation or are *de minimis* also are protected by P.L. 86-272.

(2) The interaction between the customer and the seller's website is substantial in nature.

In addition, the analysis in *South Dakota v. Wayfair, Inc.* has informed the thinking of at least some Work Group members. Although the Supreme Court in that case construed the Commerce Clause, not the language contained in P.L. 86-272, the decision speaks to the "continuous and pervasive virtual presence of retailers" in the states where their customers are located.

One member of the Work Group recently offered an alternative approach, which the Work Group has discussed. The member has advocated that *any* communication by a seller constitutes a business activity in the recipient's state, including web page content and telephone calls. The member also has advocated that the Statement of Information's definition of "de minimis activities" be expanded to include consideration of the extent to which the seller's non-solicitation activities are purposefully directed to the customer's state. Non-solicitation communications could be de minimis if they are not purposefully directed towards that state. This approach has not been adopted by the Work Group.

Members of the Work Group have taken straw votes on many scenarios.⁴ Scenarios where the votes have demonstrated a strong consensus include the following:

- A. Internet seller of tangible personal property offers customers post-sale assistance
 - via email accessed through a link on the seller's website UNPROTECTED
 - via ordinary email not accessed through a link PROTECTED
 - via electronic chat accessed through the seller's website UNPROTECTED
 - by posting on its website a list of static FAQs with answers PROTECTED
 - by placing on its website an interactive tool which allows customers to type in a question and which then provides answers UNPROTECTED
- B. Internet seller of tangible personal property offers warranty service to its customers. If a product ceases to function properly, the seller fixes the product remotely via the internet and wifi. UNPROTECTED
- C. Internet seller of tangible personal property invites customers to apply for its branded credit card via an online application. UNPROTECTED
- D. Seller maintains a website which customers access to immediately watch a movie through streaming. UNPROTECTED

⁴ The various tallies are set forth in the summary of each Task Force meeting. These summaries can be accessed from the Work Group's project page. Note that straw votes are subject to revote.

Recently, the Work Group has turned to the subject of internet apps and cookies, specifically to consider whether these tools defeat the statute's protection when they transmit information about a purchaser or a potential purchaser's web activities to the seller or to a third party. Work Group members have expressed various points of view, and this discussion is ongoing.

The Work Group has spent substantial time considering whether non-solicitation activities conducted via telephone defeat a seller's immunity under the statute. At this point, it appears to be the consensus of the group not to recommend that this subject be addressed in any revision of the Statement.

It is important to note that the Work Group's analysis is still a work in progress. In addition, MTC staff continues to encourage the taxpayer community to provide input to ensure that the members of the Work Group can hear all points of view and that decisions are based on facts and an accurate understanding of actual business practices.

Other matters relating to the conduct of business over the Internet remain to be discussed or to be discussed in greater depth. For example, P.L. 86-272 provides that the solicitation of orders for tangible personal property is a protected activity only if the orders are sent outside the state for approval or rejection (and if approved are filled by shipment or delivery from a point outside the State). The Work Group must still consider where order approval takes place in the case of Internet transactions. It appears that this approval process involves very different practices than in 1959 when in-state sales staff would transmit orders to personnel located in their company's home office for approval.

Going forward, the Work Group also will consider a number of other issues including: the application of P.L. 86-272 to cloud computing; solicitation and sale of gift cards; whether to propose revising or deleting VII(E) of the current Statement of Information which adopts the *Joyce* rule; and possible issues relating to how interpretations of the statute effect the determination of tax liabilities for prior tax periods.

Work Group members will solicit input from the Uniformity Committee at the Boise meeting, including additional subjects that the group should consider. They also have expressed an interest in any thoughts that the Committee may have on the form that the revision to the Statement should take and on whether the MTC should ask individual states to adopt the Statement as signatories, which was the practice in the past.